STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. B-03/09-186
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families, Family Services Division, to substantiate petitioner for risk of harm. The issue is whether the Department can show by a preponderance of the evidence that the petitioner placed his two children at risk of harm within the meaning of the pertinent statutes.

The underlying facts are not in dispute although the legal conclusions to be drawn from the facts are in dispute. The parties have submitted written argument. The decision is based upon the underlying facts, records, and arguments of the parties.

FINDINGS OF FACT

1. The petitioner is the parent of two children, fraternal twins, who were six years old at the time of the incident on March 3, 2008.

2. The petitioner shares parental rights and responsibilities with his ex-spouse, C. McD. They have shared parenting for over four years.

3. The petitioner went to an out of state amusement park with his children on or about March 3, 2008.

4. That evening, petitioner stopped at a gas station for directions to his hotel. Petitioner spoke to J.F.

5. J.F. recognized petitioner as the person he gave the same directions to earlier in the day. J.F. saw the children in the car and was concerned by the petitioner's behavior. J.F. telephoned the local police department to convey his concerns.

6. Officer K. found petitioner's car parked at a local restaurant. Officer K. observed the children asleep in the back seat and observed several open beer cans on the floor of the front passenger seat. Petitioner was not in the vehicle.

7. Officer K. spoke to petitioner after petitioner came back to the car. Officer K. smelled alcohol on petitioner's breath and observed that petitioner's eyes were glassy and his speech was slightly slurred. Petitioner was given field sobriety tests. Based on observations and the results of the field sobriety tests, Officer K. concluded that petitioner was inebriated.

8. Petitioner was cited for Operating Under the Influence (OUI).[1] He gave a breath sample that registered a blood alcohol reading of .18.

9. The police department contacted C. McD. to pick up the children.

10. The children were not harmed as a result of petitioner's actions. The police department, as a mandated reporter within their jurisdiction, reported the incident to the Department.

11. At the time of the incident, petitioner was not taking his medications for his bi-polar disorder. He was using alcohol to self-medicate.

12. Subsequent to this incident, petitioner sought help including hospitalization for mental health treatment, adjustment of his medications, ongoing counseling, and ongoing monitoring of his medications.

13. The Department substantiated risk of harm on January 2, 2009 based on a single egregious incident (driving while intoxicated with his children in the car).

14. The Department did a risk assessment of petitioner and rated petitioner as a negligible risk for future abuse or neglect of his children.

[1] Petitioner is currently on probation.

15. The petitioner pursued an internal review and submitted letters of support from C.McD. and from J.E., his therapist. Both noted all the efforts petitioner was making to seek help and treat his underlying illness including hospitalization, medication management, and counseling.

C.McD. wrote on February 18, 2009 that she does not believe that petitioner will act this way again. She described petitioner as an involved parent and credits the children's well-being to their shared parenting. She wrote that when petitioner is on the right combination of medications, he does not self-medicate with alcohol.

In a letter dated February 10, 2009, J.E. wrote that she started counseling petitioner several months ago and that petitioner follows through on his treatment. She believes that petitioner has good insight and has learned from the incident. She believes there is "negligible risk" in allowing petitioner to participate in school activities or coaching where other children are present.

16. The Departmental review upheld the substantiation on February 27, 2009.

17. Petitioner filed a timely appeal to the Human Services Board on March 30, 2009.

ORDER

The Department's decision is reversed.

REASONS

The Department for Children and Families is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. §§ 4914, 4915, and 4916.

The statute has been amended to provide an administrative review process to individuals challenging their placement in the registry. 33 V.S.A. § 4916a. If the substantiation is upheld by the administrative review, the individual can request a fair hearing pursuant to 3 V.S.A. § 3091. Upon a timely request for fair hearing, the Department will note in the registry that an appeal is pending. 33 V.S.A. § 4916(a).

The pertinent sections of 33 V.S.A. § 4912 define abuse and risk of harm as follows:

> (2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

> ...
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> (4) "Risk of harm" means a significant danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical injury, neglect, emotional maltreatment or sexual abuse.

In risk of harm cases, the Board applies a gross negligence or reckless behavior standard to determine whether a petitioner's actions rise to the level of risk of harm. The Board references the definition of gross negligence found in Rivard v. Roy, 124 Vt. 32 (1963). The Board first set out this standard on page 19 of Fair Hearing No. 17,588 by defining gross negligence or reckless behavior as an act that:

> (a) demonstrated a failure to exercise a minimal degree of care or showed an indifference to a duty owed to another and (b) was not merely an error of judgment, momentary inattention or loss of presence of mind.

See also Fair Hearing Nos. Y-01/08-22 and A-08/08-384.

The issue is whether, after looking at the totality of the situation and the purposes of the statute, the petitioner's actions are more than an error of judgment but rise to the level of failing to exercise a minimal degree of care towards his children.

The Department argues that petitioner should be substantiated for risk of harm due to a single egregious act of behavior. At the time of petitioner's substantiation, the

Department looked at the criteria in Interim Policy No. 55 of the Social Services Policy Manual[2]; the policy supports substantiation for a single egregious act when:

> There was a significant risk that the child could have been physically injured as a result; and
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> The physical injury would be serious.

The Department argues that there is wide-spread recognition of the risks of driving while intoxicated. In this case, petitioner had a blood alcohol count of .18 (over two times the legal limit allowed in Vermont). The Department argues that petitioner's actions show that he did not exercise a minimal degree of care towards his children who were passengers in his car.

The petitioner argues that this incident is an isolated incident and that he has taken steps to avoid any repitition. He argues that the purpose of the registry is to protect children, not to punish offenders. He argues that he is not a danger to his children or other children. In addition, he argues that he is being treated differently due to his mental impairment.

Before addressing the main gist of this case, we will address the argument about discrimination. There is no

[2] Interim Policy No. 55 was superseded by Policy No. 56, effective July 1, 2009. The definition is consistent with Interim Policy No. 55.

evidence in the record that the Department would treat any other parent or guardian who drives while intoxicated with his/her children in the vehicle differently than petitioner. The point is that petitioner drove while intoxicated while his children were in the car.

In determining whether a person's behavior rises to risk of harm, the Board has considered the particular facts in each case in light of the underlying purposes of the statute including whether the person continues to pose harm to children and the goal of strengthening families.

In Fair Hearing No. Y-01/08-22, the Board found that the petitioner committed an error of judgment leaving an unloaded rifle and box of ammunition in his unlocked car but that he did not fail to exercise a minimal degree of care to his children who loaded and shot the rifle.

In contrast, the Board found risk of harm in Fair Hearing No. 21,173 in which a respite worker allowed an individual who was charged with sexual assault in his home while he was providing respite care to a foster child. The Board's decision was affirmed by the Vermont Supreme Court in 2009. In Re Fred LaTour, Supreme Court Docket No. 2008-242 (E.O. 2009).

Fair Hearing No. 15,747 raises similarities to this case. In that case, the Department substantiated K.G. for risk of harm when she allowed her child to sit on her boyfriend's lap and operate the car. The boyfriend was inebriated. The child was not seat-belted. They drove over back dirt roads and were stopped after they pulled on a main road and were observed swerving and driving slowly. K.G. indicated she would not allow this to occur in the future. The Board reversed the substantiation finding K.G.'s actions "ill-advised" but thought it was not clear that there was a significant danger of physical harm to the child. The Board's decision was affirmed by the Vermont Supreme Court in K.G. v. Department of Social and Rehabilitative Services, 171 Vt. 529 (E.O. 2000)(Court uses deferential standard of review to Board decisions unless facts are abuse as a matter of law.)

Although the petitioner's case needs to be considered on its own facts, the facts are similar to K.G., *supra*, in which the Board did not find gross negligence.

Additionally, the Board has looked at a person's behavior in light of the underlying purposes of the statute. 33 V.S.A. § 4911. See Fair Hearing No. A-08/08-384 in which the parent left her youngest child alone in an unlocked car

in the early morning hours on a cold night. The Board considered that the parent obtained counseling, was not considered a future risk to her child or other children, was intimately involved in her children's lives, and was active in school and extra-curricular events with her children. The Board looked at the underlying purposes of the statute to strengthen families and to prevent future harm to children and, as a result, reversed the substantiation.

Petitioner's case is similar. The Department's risk assessment found that petitioner is a negligible risk of future abuse or neglect of his children. The petitioner has taken affirmative steps to deal with his underlying illness so that he does not find himself self-medicating with alcohol. Petitioner's therapist has vouched for his insight and resolve. He is well advised that a future slip-up would lead to a different result.

Petitioner is an involved parent and wants to continue being an involved parent. Part of parenting is participating in a child's school and extra-curricular activities. He would not be able to do so if he were listed on the registry.

The Department has not shown by a preponderance of evidence that petitioner should be substantiated for risk of

harm. Accordingly, the Department's decision is reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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